(22,284.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1910.

No. 663.

LAWRENCE E. SEXTON, AS TRUSTEE IN BANKRUPTCY OF KESSLER & COMPANY, APPELLANT,

vs.

LLOYDS BANK, LTD.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

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United States Circuit Court of Appeals for the Second Circuit.

In the Matter of ALFRED KESSLER et al., Composing the Firm of Kessler & Company, Bankrupts; Lawrence E. Sexton, as Trustee, etc., Appellant.

(Claim of Lloyds Bank, Ltd.)

Appeal from the District Court of the United States for the Southern District of New York.

Transcript of Record.

Printed under the Direction of the Clerk.

[Stamped:] United States Circuit Court of Appeals, Second Circuit. Filed Feb. 11, 1910. William Parkin, Clerk.

1 District Court of the United States for the Southern District of New York.

In Bankruptcy.

In the Matter of ALFRED KESSLER, RUDOLF E. F. FLINSCH, and William K. Gillette, Composing the Firm of Kessler & Company, Bankrupts.

Hearing on Objections of the Trustee to the Claim of Lloyd's Bank, Limited.

NEW YORK, *February* 10, 1909—10.30 a. m.

Present:

The Referee, Peter B. Olney, Esq.;
Wallace Macfarlane, Esq., by Mr. Gilman, for the Trustee.
Messrs. McLaughlin, Russell, Coe & Sprague, by Rufus W. Sprague, for the Claimant.

Mr. SPRAGUE: Lloyds Bank, Limited, of Manchester, England, by agreement with Kessler & Company, prior to the filing
2 of the petition in bankruptcy against them, and as far back as 1900, were accustomed to accept drafts drawn by Kessler & Company and pay them, and Kessler & Company were to remit cover, and in addition to that, they had a running account, called a dollar account, which was as follows: They opened a dollar account, made a deposit with Kessler & Company, against which they drew their checks or drafts in dollars. At the time of the filing of the petition in bankruptcy against Kessler & Company, Lloyds Bank,

Limited, had accepted, on behalf of Kessler & Company, Limited, drafts aggregating £23,188-7s.-10d., or, in American money, figured at 4.867, $112,857.90. Kessler & Company were indebted to Lloyds Bank, Limited, on the dollar account, £631-7s.-5d., or, in American money at par, at 4.867, $7,942.32. As security against any and all indebtedness of Kessler & Company to Lloyds Bank, Limited, the bank held the securities which are listed in the claim, to wit, $17,000 par value, United States of Mexico 5% bonds; $7,000, par value, Missouri, Kansas & Texas Railway Second Mortgage bonds; $10,000 Central of Georgia Railway Consolidated 5% gold bonds; $10,000 American Thread Company First Mortgage gold bonds; $10,000 Reading Company-Philadelphia-Reading Coal & Iron Company 4% General Mortgage bonds; $10,000 South Carolina & Georgia 5% Gold bonds; $5,000 Rio Grande Railway First Mortgage bonds; $10,000 Erie Railroad (Pennsylvania collateral) First Mortgage 4% Gold bonds; $20,000 Mexican Central Consolidated 4% bonds; $12,000 Tennessee Coal & Iron 5% bonds; $5,000 B. R. T. First 4's, and 100 shares American Tobacco preferred stock.

In the claim as filed, no rebate was allowed, for the reason that we claim that if interest is allowed, the interest should be
3 from the date of payment, and therefore no rebate—the date of the payment of the draft.

The drafts outstanding and accepted by Lloyds Bank, Limited, prior to the 8th of November, 1907, which fell due thereafter and were duly taken up and paid by Lloyds Bank, Limited, at their due dates, as set forth in the claim as filed, are as follows:

£60, drawn July 26, 1907, due November 8, 1907, to the order of Mecke & Company;

£2,500, drawn August 2, 1907, due on or about November 13, 1907, to the order of Kissel, Kinnicutt & Company;

£2,500, drawn August 2, 1907, due on or about November 13, 1907, to the order of Kissel, Kinnicutt & Company;

£2,500, drawn August 2, 1907, due on or about November 13, 1907, to the order of Kissel, Kinnicutt & Company;

£1,312-5s.-10d., drawn August 2, 1907, due on or about November 13, 1907, to the order of Kissel, Kinnicutt & Company;

£5,000, drawn August 2d, 1907, due November 13, 1907, to the order of John Monroe & Company;

£2,500, drawn August 2d, 1907, due November 13, 1907, to the order of Kissel, Kinnicutt & Company;

£3,000, drawn September 3, 1907, due September 14, 1907, to the order of N. Pardon;

£3,661 16s. 2d., drawn September 3, 1907, due December 14, 1907, to the order of N. Pardon;

£432 17s. 5d., drawn September 13, 1907, due December 25, 1907, to the order of N. Pardon;

A total of £23,406 19s. 5d., against which Lloyds Bank, Limited, held a credit to Kessler & Company of £218 11s. 7d., making a total indebtedness on the drafts of £23,188 7s. 10d., or, in American money at par, $112,857.90.

It is admitted that if these liabilities on the acceptances falling due and paid by Lloyds Bank, Limited, after the filing of the petition in bankruptcy, should be rebated to the date of the filing of the petition, the amount, after such rebate, would be £23,355 11s. 6d., less the cash balance in the hands of Lloyds Bank, of £218 11s. 7d.; net, £23,136 19s. 11d.

It is contended by Lloyds Bank, Limited, that the rate of exchange should be 4.867, the standard rate adopted by the United States Government.

It is contended by the trustee that the rate of exchange should be 4.85¾, the current rate on November 8, 1907, the date of the filing of the petition in bankruptcy.

After the filing of the petition and the payment by Lloyds Bank, Limited, of the drafts accepted by it, on behalf of the bankrupts, negotiations were undertaken by me, representing the bank, with Mr. Sexton, the trustee, as to the liquidation of the collaterals held by the bankrupts. Most of the collaterals were dealt in in America and were not the subject of dealing ordinarily in England, and it was agreed that, if they should be realized upon in America, they would bring more money than if they were sold in London or any part of England. However, a notice was served of demand of the debt and notice of sale on the Stock Exchange in London, and thereafter Mr. Sexton and I agreed that the sale should take place in New York, and he so wrote me under date of May 13, 1908, requesting the sale in New York. The securities were thereafter sent over by Lloyds Bank, Limited, and were disposed of in New York between the 10th day of June, 1908, and the 2nd day of July, 1908, except the $20,000 Mexican Central Railway, which was sold in London, and one United States of Mexico bond. The securities sold in New York realized $99,374.75. The cost of exchange in remitting that money to Lloyds Bank at Manchester was $114.45, making a net amount received by Lloyds Bank from the sale of the securities in New York $99,260.30. From the sale of the Mexican Central and the payment off of one United States of Mexico bond and the net amount received from New York, the total realized on the sale of the collaterals was £24,011 14s. 3d., or, in American money, at 4.867, $116,865.

Against the amount realized, the bank claims to charge an item of £13 11s., or $65.95, for postage of the securities to New York and insurance thereon. This item, I understand, is not objected to, and it is so conceded.

It further claims to charge against the amount realized on the securities a total of £191 6s. 2d., or $931.10, being counsel fees and disbursements paid by the said bank to its solicitors in Manchester and its attorneys in New York for services and disbursements in and about the sale of the collateral and the adjustment of the sale with the trustee. This is objected to by the trustee.

Making these deductions from the realizations on the collaterals just mentioned makes a total net credit of £23,906 17s. 1d., or, in American money at par, $115,867.95.

In addition to that credit, Lloyds Bank collected coupons and

dividends on the collaterals before their sale in the amount of £643 14s. 11d., or, in American money, $3,133.10 net to the bank. In making the collection of the coupons and dividends, the bank paid an aggregate of $164.89 for income tax, and this item the trustee objects to.

The total indebtedness on November 8th, without rebate, amounted to £24,820 5s. 3d., or, in American money at 4.867, $120,800.22.

Figuring the interest from the total amount of indebtedness at the rate of five per cent., which the bank was content to take, being the English rate of interest, but has no objection to taking six per cent. if the referee allows interest to the date of the final liquidation of the collateral, gives the total of interest on both the
6 accounts of £762 10s. 1d., making a total indebtedness at the date of the final liquidation of the collaterals of £25,582 15s. 4d., or $124,511.33.

Crediting against this net amount from the sale of the collaterals as above set forth and the coupons and dividends collected, a total credit of £24,450 12s., or $119,001.05, leaves a balance of indebtedness as of the 2d day of July, 1908, the date of the last sale of the collaterals, of £1,132 3s. 4d., or, in American money at 4.867 $5,510.28.

I concede that from this $5,510.28 should be deducted $164.89, being the amount of income tax paid on coupons and interest.

The REFEREE: I will dispose of that claim for counsel fees and disbursements. I disallow that—$931.10. I rule that that can not be allowed.

Mr. SPRAGUE: Exception.

The REFEREE: My opinion is that they should rebate their claim as of the 8th of November and then calculate interest on it down to the time of the sale. I will decide your case on this hearing: The question to be arrived at is how much would Kessler & Company have to pay you on the 8th of November to discharge your obligation, and that will depend upon what they could have bought exchange for.

Mr. SPRAGUE: I will concede the rate on that day was 4.85¾.

Mr. MCLEAN: The minimum was 4.85½ and the maximum was 4.86. I took the average of the maximum and the minimum, 4.85¾.

The REFEREE: You may take that as the rate of exchange. I will allow you the interest in the manner I say at six per cent. from November 8—after the rebate is paid—up to the time it was sold, and then apply your collaterals and prove for the balance as a general creditor.

7 At a Court of Bankruptcy within and for the Southern District of New York, Held at the Office of the Referee, No. 68 William Street, in the Borough of Manhattan, on the 6 Day of April, 1909.

Present: Hon. Peter B. Olney, Referee.

In the Matter of KESSLER & COMPANY, Bankrupts.

Claim of Lloyds Bank.

The petition of Lawrence E. Sexton, as the trustee of the above named bankrupts, verified the 12th day of January, 1909, praying for a re-examination of the claim of said Lloyds Bank, having come on to be heard upon the petition, claim and proofs, and after hearing counsel for the trustee and for the claimant, and due deliberation being had, it is

Ordered, that the claim of said Lloyds Bank be, and it hereby is, allowed for the purpose of the declaration of a dividend herein, at the sum of $4,521.01.

PETER B. OLNEY, *Referee.*

8 District Court of the United States, Southern District of New York.

In the Matter of ALFRED KESSLER, RUDOLPH E. F. FLINSCH, and William K. Gillett, Composing the Firm of Kessler & Company, Bankrupts.

Claim of Lloyds Bank, Ltd.

To the Honorable the District Court of the United States within and for the Southern District of New York:

The petition of Lawrence E. Sexton, as Trustee of the above-named bankrupts, respectfully shows: That your petitioner was duly appointed the Trustee of the above-named bankrupts on or about December 30, 1907, and as such was a party to certain proceedings pending before the Honorable Peter B. Olney, the Referee in charge of said estate, to-wit: a claim of Lloyds Bank, Ltd. of Manchester, England, as a creditor of the above-named bankrupts.

Upon the hearing thereof a final order was made by the said Referee allowing said claim for the sum of $4,521.01, to which order your petitioner duly excepted.

Said order is erroneous in this, that it includes interest upon the face of the claim from the date of the filing of the petition in bankruptcy until the last day on which collateral securities held
9 by the said Lloyds Bank and applicable to the reduction of the face of the claim were sold by the said Bank, which securities were less than the face of the claim without interest.

Wherefore your petitioner prays that said order be reviewed and modified by deducting therefrom the sum of $4,443.89, interest

since the date of filing the petition, and that he be restored to all things he has lost by reason of said error.

LAWRENCE E. SEXTON,
As Trustee, &c., Petitioner.

COUNTY OF NEW YORK,
Southern District of New York, ss:

Lawrence E. Sexton, being duly sworn, says that he is the petitioner herein; that he has read the foregoing petition subscribed by him; and that the same is true according to the best of his knowledge, information and belief.

LAWRENCE E. SEXTON.

Sworn to before me this 7th day of April, 1909.

GEORGE H. GILMAN,
Notary Public, New York Co.

10 District Court of the United States, Southern District of New York.

In Bankruptcy.

In the Matter of KESSLER & COMPANY, Bankrupts.

I, Peter B. Olney, one of the referees of said Court in bankruptcy, do hereby certify that in the course of the proceedings in said cause before me, the following questions arose pertinent to the said proceedings:

(1) Is a creditor holding security which is liquidated after the filing of the petition, entitled to interest upon his claim after the filing of the petition in bankruptcy, where the proceeds of the sale of the security are inadequate to pay the face of the claim?

(2) Is the rate of exchange to be taken at 4.85¾, the conceded average rate of exchange on November 8, 1907, the date of the filing of the petition in bankruptcy, or at 4.867, the rate established by the United States Government?

(3) Should the claimant be allowed to deduct from the proceeds of sold collateral securities the amount of $931.10, being counsel fees and disbursements paid by the claimant to its solicitors in Manchester, England, and attorneys in New York, for services and disbursements in and about the sale of the collateral securities?

11 The foregoing questions are certified by me for the determination of the court, upon the hearing before me of the petition by the trustee for the re-examination of the claim of Lloyds Bank, Limited, of Manchester, England. The said claim arose as follows:

At the time of the filing of the petition in bankruptcy, November 8, 1907, Lloyds Bank had two claims against the bankrupts, one amounting to £23,188 10s. This amount at rate of exchange,

4.85¾, is $112,637.60, and at rate of exchange, 4.867, is $112,-871.90. A part of this amount was not payable till subsequent to the date of the filing of the petition. If rebated to that date, and deducting the cash in claimant's hands, the amount will be £23,136 19s. 11d. This amount at 4.85¾ is $112,381.96, and at 4.867 is $112,607.75. The second claim amounts concededly to $7,942.32, on November 8, 1907, and the aggregate of the two claims is $120,-324.28, or $120,550.07.

Against this total claim Lloyds Bank held collateral securities. These collateral securities were sold after due proceedings had at the request of the trustee in New York, with one or two exceptions, at various dates between June 10 and July 2, 1908. The net amount received from the securities sold in New York was $99,374.75; and from the securities sold in London, £3,617 3s. 2d., which, figured at 4.85¾, is $17,570.33, and at 4.867 is $17,604.71; in all, $116,945.08, or $116,979.46, respectively.

Between November 8, 1907, and July 2, 1908, the date of the last sale of these securities, the claimant collected dividends and coupons upon the said collateral, amounting, after deducting £33 17s. 7d., income tax paid thereon by the claimant in London, to £643 14s. 11d., which, at 4.85¾, is $3,127.52; and at 4.867 is $3,133.10.

12 I disallow said deduction of the income tax, and find the total dividends and coupons received to be £677 12s. 6d., which, at 4.85¾, is $3,292.28, and at 4.867 is $3,297.99.

At 6% on the claim unrebated the interest from November 8, 1907, to July 2, 1908, is £915 0s. 1d.; at 4.85¾, $4,444.13; and at 4.867, $4,453.31. On the rebated claim it is $4,433.89, or $4,442.75, respectively. I allow interest at $4,433.89.

The claimant paid to solicitors, counsel and attorneys for services and disbursements in and about the sale of the collateral, a total of £191 6s. 2d., which, at 4.85¾, is $929.28; and at 4.867 is $931.10, which it claimed to deduct from the proceeds of the collateral, and which I have disallowed.

I find the claim is provable for the purpose of a dividend at the sum of.....		$4,520.81
Claim, November 8, 1907.....	$120,324.28	
Interest to July 2, 1908.....	4,433.69	
		$124,758.17
Sales of securities.....	$116,945.08	
Coupons and Dividends.....	3,292.28	
		120,237.36
		$4,520.81

Dated New York, June 4, 1909.

PETER B. OLNEY, *Referee.*

13 United States District Court, Southern District of New York.

In Bankruptcy.

In the Matter of KESSLER & COMPANY, Bankrupts.

Ex Parte LLOYDS BANK.

In this case and in three others the referee certified to the District Court the following question:

"Is a creditor holding security which is liquidated after the filing of the petition entitled to interest upon his claim after the filing of the petition in bankruptcy where the proceeds of the sales of the security are inadequate to pay the face of the claim?" Two other questions were likewise certified to the court upon which the trustee was successful and which the claimant before the court now waives. The referee has allowed the secured creditor to marshal the proceeds of the security first against interest until the date of the liquidation of the security, and has then allowed proof for the balance of the claim after the remainder of the proceeds has been deducted. The amount of the security was much more than sufficient to pay all the accrued interest between the adjudication and the date of the liquidation of the security.

WALLACE MACFARLANE,
For the Trustee.
RUFUS W. SPRAGUE,
For the Claimant.

HAND, *District Judge:*

I cannot find that this question has been raised under the present Bankruptcy Act or under any of the other acts, although
14 the negative of it has been the settled law for a long time in England. It is hardly necessary to cite authorities to show that the creditor, before the debtor's insolvency, has the right to marshal the security upon interest first and principal afterwards. This rule itself seems to have been in some doubt early in America, but it was laid down in the note on p. 87 to Williams v. Houghtaling in 3 Cowen, and I think it cannot be disputed that it is the law, generally speaking, at present. It certainly was adopted by the Supreme Court in Story v. Livingston, 13 Pet. 359, 371, and it is quite obvious that otherwise the debtor might compel the creditor to leave the interest unpaid and keep reducing the principal. Moreover, the creditor, in the absence of any provision to the contrary, has in general the right to attribute payments as he pleases.

The Bankruptcy Act provides that liens, as would in justice necessarily be the case, shall not be affected by bankruptcy, and the mortgagee collects all interest upon his claims if the security is sufficient. Coder v. Artz, 152 Fed. Rep. 943. Sec. 57th provides that the value of the securities shall be determined by converting them into money "according to the terms of the agreement, pursuant to which such securities were delivered to such creditors."

The common law being, as it is, an implied term of the agreement under "which such securities are delivered," he may marshal the securities against interest, and that right is a part of the lien itself. The statute directs proof be made for the balance after the value as so ascertained is credited. The question comes down to what value shall be credited upon the claim. If the contract expressly provided that certain expenses of collection should first be paid out of the security, I suppose that no one will contend that bankruptcy will change that provision, and that the full value of
15 the security must be credited upon the amount of the claim without first deducting those expenses allowed by the very agreement. I think interest is in the same category as any other deduction which the agreement may allow. By the implied term of the agreement, the creditor has the right before he pays any of the face of the claim to make certain deductions, among which is the deduction for interest accrued upon it; the balance is all that is applicable to payment. This is the course which the Referee has adopted and I think he is right.

As I have said, the English law has for a long time been to the contrary, and, although this is not binding upon me, I should regard it as of the greatest moment, except in a case where the rule clearly arises through inadvertence, I say it with the utmost respect. The rule appears to have originated in two cases, *ex parte* Wardell, 1787, and *ex parte* Hercey, 1792, not originally reported, except in Cooke's Bankruptcy Law, 4th Ed. 1799, p. 181. The full order made in each case may be found in Appendix A to 2 Montague and Ayrton, in which the learned reporters seem to indicate a doubt as to whether the cases in fact decided what they are said to decide in 1 Cooke's Bankruptcy Law, 181. I cannot, however, doubt that they are valid precedents, and the law seems to have started out with those two cases decided by the Chancellor squarely upon the point. No opinion, however, which has come down to the present time was given in either. In 1794 Lord Loughbrough promulgated among his orders in bankruptcy an order for the liquidation of securities by a mortgage which is at least quite ambiguous upon this point in its language. 2 Cooke's Bankruptcy Law, 4th Ed. p. 379. Indeed, from the language of this order, it would seem to follow that the creditor was entitled to prove for the whole deficiency. It is
16 quite clear, too, that the order caused trouble at the bar, for in 1798 in *ex parte* Badger, 4, Vesey, 165, the rule came for construction before Lord Loughbrough (not Lord Eldon as is stated in one of the later cases). Lord Eldon was at that time at the bar and argued the case for the creditor. He conceded that the two cases in Cooke were against him, but contended that the words of the order had raised doubt at the bar. Lord Loughbrough, however, without discussion construed his own order in accordance with *ex parte* Wardell and *ex parte* Hercey, and this seems to have settled the law in England from that time. In *ex parte* Ramsbottom, 2 Mont., and Ayrton, 80, Lord Eldon decided that the mortgagee must credit the full amount of the security against principal and interest up to the date of the commission, and the question

came up upon appeal to the Court of Review in Bankruptcy as to whether the rents and profits arising from the security between the date of the commission and of the selling order should be credited upon interest which arose during the same period, or whether that, too, must be credited upon the face of the claim. To hold this was too much for the obvious justice of the situation, and consequently the court, without much regard for consistency, held that the rents arising after the date of the commission should be credited against interest during the same period. This case is criticised in Appendix A to the volume in which it occurs by the learned reporters, and their criticism seems to be well founded. The analogy is opposite which they suggest, that where a creditor has security for two claims, one provable and the other unprovable, he may marshal his security against the unprovable claim. They very pertinently ask whether there is any valid distinction between that and the right to marshal the security against interest falling due after the date of the commission.

17 *Re* Penfold, 4 DeG. & Sm., 282, however, follows the rule in *ex parte* Badger, as does also *Re* Savin, 7 Chanc., 760, a case in the Court of Appeals. On the other hand, Justice North, in the year 1888, *in Re* Talbott, 38 Chanc. Div., 567, made a contrary decision in ignorance of *Re* Savin, but he is said to have subsequently thought he was in error, Quartermaine's Case, 1892, 1 Chanc. Div., 639. In the last mentioned case Stirling, J., wrote a long opinion reciting the history of the law to some extent as I have stated it above, and deciding in accordance with *ex parte* Badger. I think that settled the law beyond question, but if any doubt remained, it was settled by Mr. Justice Vaughan Williams *In Re* Bonacino, 1 Manson 59 (1894). After that case there can be no doubt as to the rule in England.

As I have said, it was criticised, in my judgment, with great effect, by the reporters in Appendix A to 2 Mont. & A., and likewise the inconsistency was pointed out by Stirlin, J., in Quartermaine's case (*supra*) of allowing to be credited on subsequent interest the rents and dividends from the securities which fall due after adjudication. No doubt the increase on the security is a part of the security itself and should follow the same rule. The only ground for an exception is that the increase between the date of the adjudication and the liquidation of the security is to be regarded as the return for the loss involved in waiting till it is realized; but, if so, consistency would require the result, that a security which bears no increase should be discounted as of the date of the adjudication, a proposition which no one has suggested.

If, however, my analysis of the situation at the outset of this opinion is correct, the rule itself is wrong. I have less hesitancy than I otherwise should in departing from it in that we have no statement which has come down to us of the grounds of its

18 original adoption. It is quite clear that the bar had considerable doubt as to the meaning of Lord Loughbrough's order of 1794, and that doubt I respectfully insist is much more than justified by the terms in which it was made. Lord Lough-

brough in settling the construction of that rule in *Ex parte* Badger, avowedly only meant to follow precedents already in existence, which it is possible he may not have had in mind at the time the order was promulgated. Under these circumstances, in spite of the extremely persuasive character of any rule so well settled in English law, I cannot feel that it should be binding here.

Of course, in a case in which the security was not sufficient to pay the interest which accrued upon the claim from the date of the adjudication until its liquidation, I do not mean to be understood to hold that the creditor could prove for any part of that interest remaining unpaid. In no event could the creditor prove for more than the amount of the claim at the time of the adjudication. I only decide that the implied right given him under the original contract of marshaling the security in the first instance against the interest, is not taken from him by the bankruptcy of the debtor.

The case of Commissioners v. Hercey 169 F. R. 92, 94, does not in the least militate against the construction which I have placed upon section 57-h.

In the other three cases the answer to the referee's question will be likewise in the affirmative. July 7, 1909.

19 At a Stated Term of the District Court of the United States, within and for the Southern District of New York, Held at the Court Rooms Thereof in the United States Post Office and Court House in the City of New York, on the 19th Day of July, 1909.

Present: Hon. Learned Hand, District Judge.

In Bankruptcy.

In the Matter of ALFRED KESSLER, RUDOLF E. F. FLINSCH, and William K. Gillett, Composing the Firm of Kessler & Company, Bankrupts.

Claim of Lloyds Bank, Ltd.

On all the testimony taken on behalf of the Lloyds Bank, Ltd., the claimant herein, at the hearing before Peter B. Olney, Esq., Referee, the order of said Referee allowing the claim of said Lloyds Bank for the sum of $4,521.01, the petition for review of the said order, by Lawrence E. Sexton as Trustee of the above-named bankrupts, the certificate of the Referee thereon, and on all the proceedings herein, and after hearing Mr. George H. Gilman for the trustee and Mr. Frederick C. McLoughlin for the claimant, it is

20 on motion of McLoughlin, Russell, Coe & Sprague, Esqs., Attorneys for the Claimant,

Ordered that the first question certified by the referee be answered in the affirmative, and that the order of the said referee allowing the claim of Lloyds Bank Ltd. for the sum of $4,521.01 be and the same is in all respects affirmed.

LEARNED HAND,
U. S. D. J.

District Court of the United States for the Southern District of New York.

In the Matter of ALFRED KESSLER, RUDOLF E. F. FLINSCH, and William K. Gillett, Composing the Firm of Kessler & Company, Bankrupts.

Lawrence E. Sexton, the trustee of the above named bankrupts, conceiving himself aggrieved by the order made and entered herein on July 19, 1909, in the above-entitled proceeding, wherein and whereby it was adjudged that the claim of Lloyds' Bank, Ltd., against the estate of the above named bankrupts be allowed for the sum of $4,521.01, and the first question certified by the
21 referee be answered in the affirmative, does hereby appeal from such order to the United States Circuit Court of Appeals for the Second Circuit, for the reasons specified in the assignment of errors which is filed herein, and he prays that this appeal may be allowed, and that a transcript of the proceedings and papers upon which said order was made, duly authenticated, may be sent to the said United States Circuit Court of Appeals for the Second Circuit.

Dated New York, July 27, 1909.

WALLACE MACFARLANE,
Attorney for Lawrence E. Sexton, as Trustee, Appellant,
26 Liberty Street, New York, N. Y.

The foregoing petition on appeal is granted and the claim in appeal herein is allowed.

Dated New York, July 27, 1909.

LEARNED HAND,
U. S. District Judge.

22 United States Circuit Court of Appeals for the Second Circuit.

In the Matter of ALFRED KESSLER, RUDOLF E. F. FLINSCH, and William K. Gillett, Composing the Firm of Kessler & Company, Bankrupts; Lawrence E. Sexton, as Trustee, &c., Appellant; Lloyds Bank, Ltd., Appellee.

And now comes Lawrence E. Sexton, as Trustee of the above named bankrupts, by Wallace Macfarlane, his attorney, and files the following assignment of errors upon which he will rely his appeal from the order entered herein on July 19, 1909:

First. That the District Court of the United States for the Southern District of New York erred in that it allowed the claim of Lloyds Bank, Ltd., against the estate of the above named bankrupts for the sum of $4,521.01, or for any greater sum than $1,077.12.

Second. That the said Court erred in that it allowed interest to be computed upon the principal of the said claim after the
23 8th of November, 1907, the day on which the petition in bankruptcy was filed herein.

Third. That the said Court erred in that it did not reduce the said claim to the said sum of $1,077.12.

Fourth. That the said Court erred in that it did not adjudge that the said claimant was not entitled to interest upon its claim after the date of the filing of said petition.

Fifth. That the said Court erred in that it permitted the said claimant to marshall its security and held by it as collateral to said claim and to apply the security first to the interest and to prove the balance of the principal of the claim against the estate.

Sixth. That the said Court erred in that it did not adjudge that a creditor holding security which is liquidated after the filing of the petition in bankruptcy is not entitled to interest upon his claim after the filing of the petition, where the proceeds of the sale of the security is insufficient to pay the principal of the claim.

Wherefore, the said Lawrence E. Sexton, as Trustee as aforesaid, prays that the said order be reversed, and that the said District Court may be ordered to enter an order reducing the said claim as allowed to the sum of $1,077.12, with costs to the trustee.

WALLACE MACFARLANE,
Attorney for the Trustee-Appellant,
26 *Liberty Street, New York City.*

24 UNITED STATES OF AMERICA,
Second Judicial Circuit,
Southern District of New York, ss:

To Lloyds Bank, Ltd., Greeting:

You are hereby cited and admonished to be and appear before a United States Circuit Court of Appeals for the Second Circuit, to be holden at the Borough of Manhattan, in the City of New York, in the District and Circuit above named, on the — day of August, 1909, pursuant to an appeal filed in the Clerk's office of the District Court of the United States for the Southern District of New York, wherein Lawrence E. Sexton, as Trustee of Alfred Kessler, Rudolf E. F. Flinsch and William K. Gillett, composing the firm of Kessler & Company, Bankrupts, is the appellant, and you are the appellee, to show cause, if any there be, why the judgment and order in said appeal mentioned should not be corrected and speedy justice should not be done in that behalf.

Given under my hand at the Borough of Manhattan, in the City of New York, in the District and Circuit above named, this 27 day of July, in the year of our Lord, One Thousand Nine Hundred and Nine, and of the Independence of the United States the One Hundred and Thirty-fourth.

LEARNED HAND,
U. S. District Judge.

25 UNITED STATES OF AMERICA,
Southern District of New York, ss:

In the Matter of ALFRED KESSLER et al., Firm of Kessler & Company, Bankrupts; Appeal from Order Dated July 19, 1909, Allowing the Claim of Lloyds Bank, Ltd., a Creditor; Lawrence E. Sexton, Trustee in B'k'tcy, Appellant.

I, Thomas Alexander, Clerk of the District Court of the United States of America for the Southern District of New York, do hereby Certify that the foregoing is a correct transcript of the record of the District Court in the above-entitled matter.

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, this 21 day of January, in the year of our Lord one thousand nine hundred and ten, and of the Independence of the said United States the one hundred and thirty fourth.

[SEAL.] THOS. ALEXANDER, *Clerk.*

[9638 D.]

26 United States Circuit Court of Appeals for the Second Circuit, October Term, 1909.

No. 283.

Argued May 24, 1910; Decided June 14, 1910.

In the Matter of ALFRED KESSLER et al., Bankrupts; LAWRENCE E. Sexton, as Trustee, etc., Appellant (Claim of Dreyfus & Company); The Same (Claim of Lloyds Bank, Ltd.).

Appeals from the District Court of the United States for the Southern District of New York.

Before Lacombe, Ward, and Noyes, Circuit Judges.

Appeal from Orders of the District Court, Southern District of New York.

The referee certified to the District Court the following question: "Is a creditor holding security which is liquidated after the filing of the petition entitled to interest on his claim after the filing of the petition in bankruptcy where the proceeds of the sales of the security are inadequate to pay the face of the claim?"

The referee, furthermore, allowed the secured creditors to marshal the proceeds of their collateral securities first against interest
27 on the debts accruing up to the date of the liquidation of such securities and then allowed them to prove the balance of the principal of the claims after deducting the remainder of such proceeds.

The District Court answered the question certified in the affirmative and affirmed the order of the referee allowing the claims.

NOYES, *Circuit Judge* (after making the foregoing statement):

The majority of the court are of the opinion that the District Court was right in answering the question certified to it by the referee in the affirmative and in approving the allowance of the claims. But we think it unnecessary to add anything to the very careful consideration of the subject contained in Judge Hand's opinion.

The orders of the District Court are affirmed with costs upon the opinion of the District Judge.

Wallace Macfarlane, for Appellant.
Preston Cummings, Jr., and Lorenzo Semple, for Appellees.

28 United States Circuit Court of Appeals for the Second Circuit, October Term, 1909.

No. 284.

Argued May 24, 1910; Decided June 14, 1910.

In the Matter of ALFRED KESSLER et al., Bankrupts; LAWRENCE E. Sexton, as Trustee, etc., Appellant (Claim of Dreyfus & Company); The Same (Claim of Lloyds Bank, Ltd.).

Appeals from the District Court of the United States for the Southern District of New York.

Before Lacombe, Ward, and Noyes, Circuit Judges.

WARD, *Circuit Judge:*

I dissent from the opinion of the majority in this case. It is true that a creditor selling collateral is entitled to apply the proceeds first to the payment of interest. But the Act of 1898 provides that interest shall cease to run on claims against a bankrupt's estate after the date of filing the petition. If the creditor comes into bankruptcy to claim upon any unpaid balance, so much of the proceeds of collateral as have been applied to interest accruing
29 after the petition is filed should be deducted from that balance. He should not be allowed indirectly a preference over general creditors which he could not get directly. I think this view not only carries out the purpose and provisions of the Act, but has the additional advantage of conforming to the practice in England.

30 At a Stated Term of the United States Circuit Court of Appeals in and for the Second Circuit, Held at the Court Rooms in the Post Office Building in the City of New York, on the 24th day of June, One Thousand Nine Hundred and Ten.

Present: Hon. E. Henry Lacombe, Hon. Henry G. Ward, Hon. Walter C. Noyes, Circuit Judges.

In the Matter of ALFRED KESSLER et al., Bankrupts; LAWRENCE E. Sexton, as Trustee, etc., Appellant (Claim of Lloyds Bank, Ltd.).

Appeal from the District Court of the United States for the Southern District of New York.

This cause came on to be heard on the transcript of record from the District Court of the United States, for the Southern District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged and decreed that the order of said District Court be and it hereby is affirmed with costs.

E. H. L. It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

31 Endorsed: United States Circuit Court of Appeals, Second Circuit. In re Kessler & Co. (Lloyds Bank). Order for Mandate. United States Circuit Court of Appeals Second Circuit. Filed Jun- 24, 1910. William Parkin, Clerk.

32 United States Circuit Court of Appeals for the Second Circuit.

In the Matter of ALFRED KESSLER, RUDOLF E. F. FLINSCH, and William K. Gillett, Composing the Firm of Kessler & Company, Bankrupts; Lawrence E. Sexton, as Trustee, &c., Appellant; Lloyds Bank, Ltd., Appellee.

Findings of Fact and Conclusion of Law Pursuant to General Order in Bankruptcy XXXVI.

First. An involuntary petition in bankruptcy was filed herein against Kessler & Co. on November 8, 1907, and they were thereafter duly adjudicated bankrupts.

Second. The claimant, Lloyds Bank Ltd., filed a proof of claim herein upon certain drafts drawn upon it by the bankrupts and subsequently paid by it, the face value of which as of the date of the filing of petition was $120,324.28.

Third. Against this claim, Lloyd's Bank held collateral security which was sold at various dates after the filing of the petition, the date of the last sale being July 2, 1908, and the net amount received therefor being $116,945.08.

Fourth. Lloyds Bank also collected, after November 8, 1907, dividends and coupons on the collateral aggregating $3,292.28.

33 Fifth. The interest upon $120,234.28, (the claim as rebated) from November 8, 1907, to July 2, 1908, allowing for partial payments by the sales of security, is $4,433.89.

Sixth. Lloyds Bank applied the proceeds of the security first to paying the interest which had accrued on its claim subsequent to November 8, 1907, the date when the petition was filed; and claimed that it should be allowed dividends on the difference between the principal of its claim and the remainder of the proceeds of the security, to-wit, $4,520.81.

Seventh. The referee allowed the claim for dividends as follows:

Claim Nov. 8, 1907		$120,324.28
Interest to July 2, 1908		4,433.89
		$124,758.17
Sales of Securities	$116,945.08	
Coupons & Dividends	3,292.28	
		120,237.36
		$4,520.81

and on the trustee's petition, certified to the District Court the following question:

"Is a creditor holding security which is liquidated after the filing of the petition, entitled to interest upon his claim after the filing of the petition in bankruptcy, where the proceeds of the sale of the security are inadequate to pay the face of the claim?"

The District Court answered the question in the affirmative; and the trustee appealed to the Circuit Court of Appeals.

34 *Conclusion of Law.*

Lloyds Bank is entitled to be allowed dividends upon the unpaid balance of its claim as settled by the referee, to-wit, upon the sum of $4,520.81.

E. HENRY LACOMBE, *C. J.*
WALTER C. NOYES, *C. J.*

Endorsed: United States Circuit Court of Appeals for the Second Circuit. In the Matter if Alfred Kessler, Rudolf E. F. Flinsch and William K. Gillett, composing the firm of Kessler & Company, Bankrupts. Lawrence E. Sexton, as Trustee, &c., Appellant. Lloyds Bank, Ltd., Appellee. Findings of Fact and Conclusion of law of Circuit Court of Appeals. Wallace Macfarlane, Attorney for the trustee, 26 Liberty Street, New York, N. Y. Notice of Settlement waived June 23, 1910. McLaughlin, Russell, Coe & Spragus, Solicitors for Lloyds Bank, Ltd. United States Circuit Court of Appeals, Second Circuit. Filed Jul- 7, 1910. William Parkin, Clerk.

35 The United States Circuit Court of Appeals for the Second Circuit.

In the Matter of ALFRED KESSLER, RUDOLF E. F. FLINSCH, and William K. Gillett, Composing the Firm of Kessler & Company, Bankrupts; Lawrence E. Sexton, as Trustee, &c., Appellant; Lloyds Bank, Ltd., Appellee.

Petition for Appeal.

Now comes the appellant Lawrence E. Sexton, as trustee in bankruptcy of the bankrupts above named, and conceiving himself aggrieved by the final decree heretofore made and entered by this court against him and in favor of the appellee, Lloyds Bank, Ltd., on or about the 24th day of June, 1910, and having duly filed in the office of the clerk of this court his assignment of errors, prays that an appeal may be allowed in the above-entitled proceeding to the Supreme Court of the United States, and that a transcript of the record, proceedings and papers upon which said appeal was made, duly authenticated, be sent to said Supreme Court of the United States.

Dated, New York, July 15, 1910.

WALLACE MACFARLANE,
Att'y for Lawrence E. Sexton, as Trustee in Bankruptcy of Kessler & Co., Appellant.

36 And now, to-wit, on the 16 day of July, 1910, it is ordered that the foregoing application be granted and the appeal allowed as prayed for.

Dated, New York, July 16, 1910.

WALTER C. NOYES,
Judge of United States Circuit Court and of the U. S. Circuit Court of Appeals for the Second Circuit.

Endorsed: The United States Circuit Court of Appeals for the Second Circuit. In the Matter of Alfred Kessler, Rudolf E. F. Flinsch and William K. Gillett, composing the firm of Kessler & Co., Bankrupts. Lawrence E. Sexton, as Trustee, &c., Appellant. Lloyds Bank, Ltd., Appellee. Petition for Appeal. Wallace Macfarlane, Attorney for Lawrence E. Sexton, as Trustee in Bankruptcy of Kessler & Co., Appellant, 26 Liberty Street, New York, N. Y. United States Circuit Court of Appeals for the Second Circuit. Filed Jul- 19, 1910. William Parkin, Clerk.

37 The United States Circuit Court of Appeals for the Second Circuit.

In the Matter of ALFRED KESSLER, RUDOLF E. F. FLINSCH, and William K. Gillett, Composing the Firm of Kessler & Company, Bankrupts; Lawrence E. Sexton, as Trustee, &c., Appellant; Lloyds Bank, Ltd., Appellee.

Assignments of Error.

And now comes Lawrence E. Sexton as Trustee aforesaid, appellant, by Wallace Macfarlane, his attorney, and respectfully represents that he feels himself to be aggrieved by the proceedings and decree in the above-entitled cause in the United States Circuit Court of Appeals for the Second Circuit, and says, that in the record and proceedings therein there is manifest error in each and every one of the following rulings of the court, to wit:—

First. In that the said Circuit Court of Appeals ordered, adjudged and decreed that the order of the District Court of the United States for the Southern District of New York, entered herein on
38 the 19th day of July, 1909, should be affirmed with costs, said order of the District Court having ordered that the first question certified by the referee should be answered in the affirmative, and that the order of the referee allowing the claim of Lloyds Bank, Ltd., for the purpose of a dividend, should be in all respects affirmed.

Second. In that the said Circuit Court of Appeals did not order, adjudge and decree that the said order of the District Court for the Southern District of New York should be reversed.

Third. In that the said Circuit Court of Appeals decided that a creditor holding security which is liquidated after the filing of the petition in bankruptcy is entitled to interest on his claim after the date of the filing of such petition, where the proceeds of the sale of the security are inadequate to pay the face of the claim.

Fourth. In that the said Circuit Court of Appeals decided that the portion of the appellee's secured claim upon which it should be paid dividends under section 57 (*h*) of the United States Bankruptcy Law should be determined by adding to the claim as allowed at the time of filing the petition in bankruptcy interest subsequently accruing between the date of filing the petition and the last
39 sale of the collateral, and by crediting upon such total principal and interest the total proceeds of the sale of the collateral and the earnings thereof, if any, collected thereon after the filing of the petition; and that dividends should be paid from the bankrupt estate upon the remainder.

Wherefore, the appellant respectfully prays that the errors assigned be examined and corrected by this Honorable Court, and that the judgment entered herein by the District Court and the

Circuit Court of Appeals be reversed, and the cause remanded for further proceedings not inconsistent with the law.

Dated, New York, July 15, 1910.

WALLACE MACFARLANE,
Att'y for Lawrence E. Sexton, as Trustee in Bankruptcy of Kessler & Co., Appellant, 26 Liberty Street, New York, N. Y.

Endorsed: The United States Circuit Court of Appeals for the Second Circuit. In the Matter of Alfred Kessler, Rudolf E. F. Flinsch and William K. Gillett, composing the firm of Kessler & Co., Bankrupts. Lawrence E. Sexton, as Trustee, &c., Appellant. Lloyds Bank, Ltd., Appellee. Assignments of Error. Wallace Macfarlane, Attorney for Lawrence E. Sexton, as Trustee in Bankruptcy of Kessler & Co., Appellant, 26 Liberty Street, New York, N. Y.

40 UNITED STATES OF AMERICA,
Southern District of New York, ss:

I, William Parkin, Clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby Certify that the foregoing pages, numbered from — to — inclusive, contain a true and complete transcript of the record and proceedings had in said Court, in the case of Matter of Alfred Kessler et al., composing the firm of Kessler & Co., Lawrence E. Sexton, as Trustee, etc., Appellant, (Lloyds Bank claim) as the same remain of record and on file in my office.

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this — day of —— in the year of our Lord One Thousand Nine Hundred and — and of the Independence of the said United States the One Hundred and ——.

[Seal United States Circuit Court of Appeals, Second Circuit.]

WM. PARKIN, *Clerk.*

41 UNITED STATES OF AMERICA, *ss:*

To Lloyds Bank, Ltd., Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States at Washington within thirty days from the date hereof pursuant to an appeal filed in the Clerk's Office of the United States Circuit Court of Appeals for the Second Circuit, wherein Lawrence E. Sexton, as Trustee in Bankruptcy of Kessler & Company, is appellant and you are appellee, to show cause, if any there be, why the decree rendered against the said appellant as in the said appeal mentioned should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness Hon. John M. Harlan, an Associate Justice of the Su-

preme Court of the United States, this 16th day of July, in the year of our Lord one thousand nind hundred and ten.

WALTER C. NOYES,
Judge of the United States Circuit Court and the United States Circuit Court of Appeals for the Second Circuit.

42 [Endorsed:] The United States Circuit Court of Appeals for the Second Circuit. In the Matter of Alfred Kessler, Rudolf E. F. Flinsch and William K. Gillett, composing the firm of Kessler & Co., Bankrupts. Lawrence E. Sexton, as Trustee, &c., Appellant. Lloyds Bank, Ltd., Appellee. Original. Citation. Wallace Macfarlane, Attorney for Lawrence E. Sexton, as Trustee in Bankruptcy of Kessler & Co., Appellant, 26 Liberty Street, New York, N. Y. United States Circuit Court of Appeals, Second Circuit. Filed Jul- 21, 1910. William Parkin, Clerk. Service of the within Citation is admitted July 21, 1910. Received copy. McLaughlin, Russell, Coe & Sprague, att'ys for Lloyds Bank, Ltd.

Endorsed on cover: File No. 22,284. U. S. Circuit Court of Appeals, 2d Circuit. Term No. 663. Lawrence E. Sexton, as trustee in bankruptcy of Kessler & Company, appellant, vs. Lloyds Bank, Ltd. Filed August 2d, 1910. File No. 22,284.